

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 34

UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte KENNETH TUROS

Appeal No. 2002-0022
Application No. 09/161,071

ON BRIEF¹

Before McCANDLISH, Senior Administrative Patent Judge, FRANKFORT and NASE,
Administrative Patent Judges.

NASE, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 39 to 50, which are all of the claims pending in this application.

¹ We note that the appellant has requested an oral hearing (Paper No. 27, filed July 2, 2001), but under the circumstances a hearing is not considered necessary. See 37 CFR § 1.194(c), last sentence, as amended effective Dec. 1, 1997, by final rule notice, 62 Fed. Reg. 53131 (Oct. 10, 1997), 1203 Off. Gaz. Pat. Office 63, (Oct. 21, 1997).

We REVERSE.

BACKGROUND

The appellant's invention relates to a cleat removably mountable on footwear for providing stability to a user while not causing damage to sporting facilities (specification, p. 1). A copy of the claims under appeal is set forth in the appendix to the appellant's brief.

The prior art applied by the examiner in rejecting the appealed claims are:

Pierce et al. (Pierce)	2,292,238	Aug. 4, 1942
MacNeill et al. (MacNeill)	5,027,532	July 2, 1991
Castioni	IT 467815 ²	Oct. 20, 1953

Claims 39 to 48 stand rejected under 35 U.S.C. § 103 as being unpatentable over Pierce in view of Castioni.

Claims 49 and 50 stand rejected under 35 U.S.C. § 103 as being unpatentable over Pierce in view of Castioni and MacNeill.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejections, we make reference to the answer (Paper

² In determining the teachings of Castioni, we will rely on the translation of record provided by the appellant.

No. 26, mailed May 2, 2001) for the examiner's complete reasoning in support of the rejections, and to the brief (Paper No. 25, filed March 16, 2001) and reply brief (Paper No. 28, filed July 2, 2001) for the appellant's arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims, to the applied prior art, and to the respective positions articulated by the appellant and the examiner. Upon evaluation of all the evidence before us, it is our conclusion that the evidence adduced by the examiner is insufficient to establish a prima facie case of obviousness with respect to the claims under appeal. Accordingly, we will not sustain the examiner's rejection of claims 39 to 50 under 35 U.S.C. § 103. Our reasoning for this determination follows.

In rejecting claims under 35 U.S.C. § 103, the examiner bears the initial burden of presenting a prima facie case of obviousness. See In re Rijckaert, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993). A prima facie case of obviousness is established by presenting evidence that would have led one of ordinary skill in the art to combine the relevant teachings of the references to arrive at the claimed invention. See In re Fine, 837

F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988) and In re Lintner, 458 F.2d 1013, 1016, 173 USPQ 560, 562 (CCPA 1972).

We will not sustain the rejection of claims 39 to 50 since the claimed subject matter is not suggested by the combined teachings of the applied prior art. All the claims under appeal require the cleat to include a body having either an annular ring which encircles a hemispherical chamber (independent claim 39) or at least one annular ring having a substantially hemispherical chamber (independent claim 42). The examiner correctly ascertained (answer, p. 3) that Pierce did not teach a cleat having a body with a hemispherical chamber within an annular ring. Next, the examiner determined (answer, p. 3) that Castioni teaches a cleat having concentric annular rings with a hemispherical chamber within the rings. We do not agree. While Castioni clearly teaches a cleat having concentric annular rings we fail to find any teaching that the chamber circumscribed by the innermost annular ring is either substantially hemispherical or hemispherical. The examiner's finding that the chamber circumscribed by the innermost annular ring of Castioni is hemispherical is without support and, in our view, is clearly based on sheer speculation based upon hindsight knowledge derived from the appellant's own disclosure.³

In addition, we note that MacNeill has no such hemispherical chamber or substantially hemispherical chamber.

³ The use of such hindsight knowledge to support an obviousness rejection under 35 U.S.C. § 103 is, of course, impermissible. See, for example, W. L. Gore and Assocs., Inc. v. Garlock, Inc., 721 F.2d 1540, 1553, 220 USPQ 303, 312-13 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984).

Since the claimed cleat having a substantially hemispherical chamber or a hemispherical chamber is not taught or suggested by the applied prior art for the reasons set forth above, the decision of the examiner to reject claims 39 to 50 under 35 U.S.C. § 103 is reversed.

CONCLUSION

To summarize, the decision of the examiner to reject claims 39 to 50 under 35 U.S.C. § 103 is reversed.

REVERSED

HARRISON E. McCANDLISH
Senior Administrative Patent Judge

CHARLES E. FRANKFORT
Administrative Patent Judge

JEFFREY V. NASE
Administrative Patent Judge

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